No. 463

In the Supreme Court of the United States

October Term, 1947

The United States of America, Appellant,

v.

Columbia Steel Company, Consolidated Steel Corporation, United States Steel Corporation and United States Steel Corporation of Delaware

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF DELAWARE

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the District Court for the District of Delaware (R. 54-67) is reported in 74 F. Supp. 671.

JURISDICTION

The judgment of the district court dismissing the complaint was entered on November 14, 1947 (R. 67). Petition for appeal was filed and allowed on November 18, 1947 (R. 72). The jurisdiction of this Court is conferred by Section 2 of the Act of February 11, 1903, 32 Stat. 823, 15 U.S.C. 29, and Section 238 of the Judicial Code, as

amended by the Act of February 13, 1925, 43 Stat. 936, 938, 28 U.S.C. 345. Probable jurisdiction was noted on December 22, 1947 (R. 687):

QUESTIONS PRESENTED

The basic question presented is whether acquisition of Consolidated Steel Corporation by United States Steel Corporation (referred to as U. S. Steel) constitutes, under any or all of the following circumstances, a combination in unlawful restraint of interstate commerce:

(a) When U. S. Steel, having a West Coast plant for making rolled steel products with a capacity in excess of the estimated normal demand for its products, acquires a West Coast company (Consolidated) which uses in its business rolled steel products costing about $11,000,000 annually, with the effect and for the purpose of monopolizing the business of supplying the rolled steel requirements of the acquired company and eliminating it as a market outlet for all other producers of rolled steel.

(b) When Consolidated makes and sells every type of structural steel product made by U. S. Steel and, in Consolidated's marketing area, U. S. Steel is the largest seller of such products, Consolidated is the second or third largest seller, Consolidated and U. S. Steel are the outstanding competitors as to some types of products, and Consolidated promises to be for the future an increasingly potent competitor of U. S. Steel.

(c) When U. S. Steel and Consolidated are among a very limited number of companies equipped to make pipe for long-distance oil and gas pipe lines, both sell such pipe in the Consolidated market area, both have supplied part of the requirements for particular pipe lines, and, to the extent that U. S. Steel's current price is lower than Con-

solidated's on pipe of certain diameters, the latter's more expensive but larger-diameter pipe offers to prospective purchasers a valuable competitive choice.

The case presents the further question whether the agreement to acquire Consolidated constitutes an attempt by U. S. Steel to monopolize interstate commerce in fabricated steel products in the marketing area served by Consolidated.

STATUTE INVOLVED

The Act of July 2, 1890, 26 Stat. 209, known as the Sherman Act, provides in part as follows:

> Section 1 [as amended by the Act of August 17, 1937, 50 Stat. 693]. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * * [15 U.S.C. 1.]
>
> Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * * [15 U.S.C. 2.]
>
> * * * * * * *
>
> Sec. 4 [as amended by the Act of March 3, 1911, Sec. 291, 36 Stat. 1167]. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. * * * [15 U.S.C. 4.]

STATEMENT

The United States on February 24, 1947, brought this suit under Section 4 of the Sherman Act to enjoin the

carrying out of an agreement dated December 14, 1946, providing for the purchase by a subsidiary of the United States Steel Corporation of the assets, business, and good will of Consolidated Steel Company and four subsidiaries of that company (R. 1-2).[1] The complaint charges that consummation of this agreement would eliminate substantial competition in the sale of steel and steel products and would unreasonably restrain interstate commerce, in violation of Section 1 of the Sherman Act (R. 3). The complaint also charges that, in making this agreement, U. S. Steel and its co-defendant subsidiaries[2] have concertedly attempted to monopolize a part of interstate commerce in violation of Section 2 of the Act (R. 3).

A temporary order enjoining consummation of the acquisition was entered on June 3, 1947 (R. 34-35), and trial on the merits followed. The evidence introduced at the trial consisted of approximately 100 exhibits and the testimony of nine witnesses, five of whom testified almost exclusively in support of statistical tabulations introduced in evidence as exhibits.[3]

Following trial and the submission of briefs, the court rendered an opinion on November 7, 1947, holding that the plaintiff was not entitled to any relief (R. 54-67), and entered final judgment on November 14, 1947, dismissing the Government's complaint (R. 67). By the terms of

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[1] The subsidiaries are: Western Pipe & Steel Company, Steel Tank & Pipe Company, Consolidated Shipyards, Inc., and Consolidated Steel Corporation of Texas (R. 80).

[2] The co-defendant subsidiaries are: Columbia Steel Company, which is engaged on the West Coast in making and selling rolled steel products and also in selling fabricated structural products of other U. S. Steel subsidiaries; and United States Steel Corporation of Delaware, which renders technical assistance to all U. S. Steel subsidiaries engaged in rolling and fabricating steel products (Fngs. 3, 4, R. 36).

[3] Obbard (R. 139-253), Collins (R. 253-268), Stringfield (R. 268-276), Wein (R. 416-445), and Kelly (R. 446-449).

this judgment continuance of the temporary restraining order of June 3, 1947, was made contingent upon the taking of an appeal to this Court within five days of the judgment (*ibid.*).

The district court's findings of fact are set forth in 64 numbered paragraphs (R. 35-53). Error has been assigned to each of the court's ultimate or conclusory findings[4] and to all or part of various other findings.[5] While the Government has not challenged most of the district court's findings as to specific facts, it believes that many of them have little relevance to the issues in this case and that the significance of many others can be determined only if weighed in relation to other undisputed facts which the findings ignore or fail properly to evaluate. We shall, in our statement of the case, bring to the Court's attention numerous undisputed facts which, in our opinion, limit, negative, or destroy the relevancy of, many of the facts found by the district court.[6]

The Business of Consolidated

Since this case involves the legality of the attempted elimination of Consolidated Steel Company as a competitor, our statement of the facts can usefully begin with a brief description of its plants and business. The company, together with its subsidiaries, will be referred to as Consolidated.

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[4] Findings 58-64 (R. 53), assigned as error (Assignments 26-32, R. 71-72).

[5] The findings to which we refer, showing in parentheses in each case the applicable paragraph or paragraphs of the assignment of errors are: 6(5), 16(6-8), 20(9-11, 14), 22(12), 27(13), 28(15), 29(16), 30(17), 32(18), 34(19), 35(20-22), 38(23-24), 49(24), 56(25). For the Government's assignment of errors, see R. 68-72.

[6] The findings of the district court represent an almost verbatim adoption, apart from minor variations or deletions, of the findings requested by appellees. This circumstance may account for what we regard as serious inadequacies and errors in the findings.

Consolidated is engaged in making a wide variety of fabricated steel products; a list of its principal products includes over 50 different types (R. 409-410). A fabricated product is one which is made by shearing, trimming, drilling, punching, bending, and forming rolled steel products (such as steel plates, sheets, shapes, and bars), and then riveting or welding them into the completed unit or product (Fng. 5, R. 36). Except for certain types of culvert pipe, Consolidated is not engaged in the repetitive, mass-production manufacture of identical stock products; rather, it fabricates products to meet a particular purchaser's specifications and requirements (R. 409). Consolidated does not make rolled steel products (Fng. 9, R. 37) and its purchases of this raw material during the period 1937-1946 cost nearly $114,000,000, (Pl. Ex. 3 R. 513-514).

Consolidated's largest plant is at Maywood, California, on the outskirts of Los Angeles (R. 333). It manufactures there both structural steel products, which consist of buildings, bridges, and structural frames of all kinds, made primarily of steel shapes, and plate products, which consist of pressure vessels of all kinds, pipe for pipe lines, and other products, made primarily from steel plates (R. 332-333, 401-402; Fng. 6, R. 36). Its other plants are: two large and three small plants making plate products located in California, a "very small" plate plant in Arizona,[7] and a plant for making structural steel products at Orange, Texas (R. 335). The Texas plant was purchased in 1940 for about $63,000 and during the war period it fabricated chiefly "war requirements on structural steel" (R. 335).

Consolidated markets its products principally in California, where its production is concentrated, but its marketing territory also includes Arizona, Idaho, Louisiana, Montana,

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[7] The Arizona plant employs about 75 people, as compared with about 4266 employees in the various California plants (R. 333-335).

Nevada, New Mexico, Oregon, Texas, Utah, and Washington (Cons. Answer, Pars. 5, 7, R. 5). These States, plus California, will be sometimes referred to as the Consolidated market.

The Business of United States Steel Corporation

The agreement of December 14, 1946, provides for purchase of the business and assets of Consolidated by Columbia Steel Company, a wholly-owned subsidiary of United States Steel Corporation. The former company will be called Columbia and the latter U. S. Steel, and our references to the business of U. S. Steel will apply to the business of its various operating subsidiaries.

Before describing that part of U. S. Steel's business bearing most directly upon the legality of the proposed acquisition of Consolidated, we shall call attention to certain facts concerning its over-all operations and position in the steel industry. It owns lands containing the raw materials used in making iron and steel, mines and transports these materials, converts them into rolled steel products, fabricates the rolled steel into finished and semi-finished products, and transports the finished products to consumers.[8] U. S. Steel thus has, when competing with other producers of steel products, all of the advantages flowing from complete vertical integration. It also derives substantial income from a number of activities not related to making steel or steel products, such as manufacture of cement and coal chemicals and furnishing transportation.[9]

U. S. Steel is the largest producer of rolled steel products in the United States (R. 20) and it has approximately one-third of the steel ingot capacity of the entire industry (Def.

[8] Pl. Ex. 36, U. S. Steel Annual Report for 1946, pp. 6-8 (not printed), p. 36 (R. 576-578); Pl. Ex. 10 (R. 528).

[9] Pl. Ex. 36, U. S. Steel Annual Report, pp. 4, 8 (not printed).

Ex. 37, R. 589). Its net assets on December 31, 1946, were over $1,450,000,000 and its 1946 net receipts, from products and services sold, approximated $1,500,000,000 (Pl. Ex. 36, R. 572-573, 576).[10] Its vast resources give it almost unlimited powers of vertical and horizontal expansion (apart from the limitations imposed by the antitrust laws). The expansion program on which it has embarked in the Pacific Coast area illustrates this. In its offer to buy the Government-owned steel plant at Geneva, Utah, U. S. Steel committed itself to a capital expenditure of over $91,000,000 (Def. Ex. 64, R. 659). In its bid (Def. Ex. 64, R. 649), U. S. Steel outlined its plans for operation at Geneva to show that the purchase would comply with the antitrust objectives of the Surplus Property Act of 1944.[11] The bid recited that U. S. Steel proposed to erect a new cold reduction mill at Columbia's Pittsburg, California, plant which would consume 386,000 tons of hot-rolled coils to be produced at Geneva when proposed changes in its rolling equipment were completed. The plates and shapes which it was then equipped to roll and which it would continue to produce in addition to the hot-rolled coils were to be sold so as "to foster the location of steel-consuming manufacturing plants in the Western States" and the volume produced was to be "largely dependent upon the market demand". (Def. Ex. 64, R. 655-656.)

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[10] These receipts were almost double the 1946 net sales of Bethlehem Steel Corporation, the next largest steel company (Def. Ex. 63, R. 622).

[11] This Act was designed, among other things "to discourage monopolistic practices and to strengthen and preserve the competitive position of small business concerns in an economy of free enterprise," and to develop new independent enterprise (58 Stat. 765, Sec. 2, 50 U.S.C. App. Supp. V, 1611 (b), (d), (p), (r)). Section 20 of the Act required that disposals of large plants must be referred to the Attorney General for his opinion as to whether the proposal would violate the antitrust laws, and provided that nothing in the Act "shall impair, amend, or modify the antitrust laws or limit and prevent their application to persons who buy or otherwise acquire property under the provisions of this Act" (50 U.S.C. App., Supp. V, 1629).

Within a short time after purchase of the Geneva plant in June 1946 (R. 373-374), U. S. Steel agreed to buy the assets of Consolidated, a purchase which involves a capital expenditure of over $11,000,000 and a further payment of some $5,000,000 for Consolidated's current tangible assets (*infra*, pp. 12-13). It is noteworthy that U. S. Steel now puts forth the fact that it has expanded at one stage or level in the production of steel products, as a reason for expanding at the next stage or level. Since its acquisition of the Geneva plant, U. S. Steel has had over 51% of the ingot (rolled steel) capacity of the Pacific Coast area.[12] It has at the Geneva plant alone a capacity for making plates and structural shapes which U. S. Steel estimated to be "greatly in excess of any likely postwar needs for these products on the west coast" (Def. Ex. 64, R. 652). Now U. S. Steel proposes to acquire Consolidated and states that a "major purpose" of the acquisition is to secure an outlet for the products of its Geneva plant (R. 21).[13] If it is so important to U. S. Steel that all of Consolidated's purchases of plates and structural shapes should be made from U. S. Steel, the question which we pose, parenthetically, is why will not the other Pacific Coast producers of plates and structural shapes be injured, at least to the degree that U. S. Steel is benefitted, if Consolidated is eliminated as a market outlet for the products of these other producers.

U. S. Steel has been, since 1930, the dominant steel producer in the Pacific Coast area. Before World War II

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[12] In 1946 the ingot capacity of this area was 3,631,020 tons, of which 1,283,400 was Geneva's capacity and 2,347,620 was the remaining capacity, and U. S. Steel's capacity there was 1,863,200 (Geneva 1,283,400 tons, Columbia 579,800 tons), or 51.3% of the total (Def. Ex. 64, R. 651-652, 657).

[13] The president of U. S. Steel, testifying as to its objective in acquiring Consolidated, stated: "The object was just one, one motive and only one motive, and that was to secure sufficient backlog to operate the newly acquired Geneva Steel plant on a successful basis * * *" (R. 381).

Columbia maintained the only integrated steel operations west of the Rocky Mountains, with a blast furnace and by-product coke ovens at Ironton, Utah, and with steel mills and finishing facilities at Pittsburg and Torrance, California (Def. Ex. 64, R. 651). The properties operated by Columbia were acquired by U. S. Steel in 1930 from an independent producer previously competing with U. S. Steel in the sale of rolled steel products (R. 105-106).

U. S. Steel has two subsidiaries which make structural steel products—American Bridge Company and Virginia Bridge Company (Pl. Ex. 4, R. 521-523).[14] Their plants are located at various places east of the Mississippi River but their products are sold throughout the United States, with Columbia acting as their sales agent on the Pacific Coast (R. 141-142). The Bridge companies also make certain products from steel plates—landing ships, barges, and railroad cars (R. 205-206). In 1946 their combined sales in the Consolidated market were $8,883,383, of which $5,270,465 were in California (Pl. Ex. 4, R. 522-523). For the period 1937-1946 their sales in the Consolidated market were over $70,000,000 (Def. Ex. 58, R. 613).

Another subsidiary of U. S. Steel, National Tube Company, makes principally steel pipe and tubing, which include trunkline pipe for oil and gas companies, drill pipe casing and oil well tubing (commonly known as oil country goods), pipe for construction purposes, and various tubing specialties such as boiler tubes, steam tubes, refinery pipe, etc. (R. 278-279). Its 1946 sales in the Consolidated market were $22,751,249, which was 23% of its total 1946 sales (Pl. Ex. 11, R. 529). Pipe has also been one of the most important products sold by Consolidated (*infra*, pp. 25-26). The dis-

[14] Another subsidiary, Federal Shipbuilding & Dry Dock Company, is engaged in shipbuilding, but U. S. Steel states that this activity, as distinguished from making steel barges, is not regarded as steel fabrication (R. 92).

trict court nevertheless found that Consolidated and National Tube "do not compete in the sale of their pipe products" (Fng. 20, R. 40). This finding has been assigned as error (R. 69) and certain facts bearing on its validity will be set forth later (*infra*, pp. 25-27).

Another U. S. Steel subsidiary, Oil Well Supply Company, sells pipe for long distance transportation of petroleum products and for gathering lines, as well as various items used in producing oil and bringing it to the surface; and its 1946 sales in the Consolidated market were \$21,455,-310, which was 47% of its total sales in that year (R. 279; Pl. Ex. 11, R. 530). The properties and business of this company, which has a manufacturing plant at Los Angeles, California, were acquired by U. S. Steel in 1930 (R. 110, 111).

The Circumstances and Terms of the Consolidated Acquisition

During the war period Consolidated engaged in shipbuilding and related war work and received for such work more than \$1,560,000,000 (R. 341; Def. Ex. 60, R. 615). In 1945 Alden G. Roach, president of Consolidated, concluded that it would be advantageous to its stockholders to realize upon their existing capital equity by disposing of Consolidated to some strong company, rather than to subject this equity to the hazards of changes in business conditions and profits (R. 342, 349-350). He discussed a possible sale both with Bethlehem Steel and with Benjamin F. Fairless, president of U. S. Steel, but at that time received no encouragement (R. 341-342, 350). When he again saw Fairless early in 1946 the latter was more receptive but wished to postpone discussion until U. S. Steel had reached a decision on bidding for the Government steel plant at Geneva (R. 342, 377-378). Following U. S. Steel's acquisition of the Geneva plant, Fairless called Roach on the telephone and told him

that U. S. Steel was prepared to begin serious negotiations (R. 343, 379-380).

In the summer of 1946 U. S. Steel appointed a committee to study Consolidated's plants and business and later appointed a committee to negotiate for purchase of Consolidated (R. 322). U. S. Steel estimated that Consolidated had a capacity of 200,000 tons annually and that its probable sales would be 132,000 tons having a dollar value of around $22,000,000 (R. 323, 325). To arrive at the purchase price which U. S. Steel would pay, estimated future earnings of the business were capitalized at 8% (R. 323). Another method used in calculating the price to be paid was to estimate the present reproduction cost of Consolidated's fixed assets, and deduct therefrom estimated depreciation plus the $1,000,000 cost of making certain plant changes believed necessary (*ibid.*). This calculation produced a figure of $8,800,000, and the committee decided that $8,500,000 was the maximum price which should be paid for the fixed assets (*ibid.*).

The purchase agreement of December 14, 1946, provides for payment of $8,293,319 for Consolidated's fixed assets, subject to adjustment for property changes between August 31, 1946, and the agreed closing date of March 31, 1947 (Pl. Ex. 1, pp. 15-18, R. 459-463).[15] These adjustments, it was contemplated, would make the price of the fixed assets about $10,000,000 (Pl. Ex. 2, R. 507). By the terms of the agreement, Consolidated is to retain all of its cash, securities, accounts and notes receivable, all Government contracts except three, and the inventories and work in process which relate to the retained Government contracts (Pl. Ex. 1, R. 456-457). All other inventories and sales contracts are to

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[15] A later agreement fixes the closing date as the last day of the calendar month in which shall fall the sixtieth day after final termination, if adverse to the plaintiff, of the present proceeding (Pl. Ex. 1, R. 487-488).

pass to the purchaser and be paid for on the basis of cost.[16]

Consolidated's earned surplus on August 31, 1946, was $8,371,885, which was after charges against surplus totaling $3,576,593 representing the cost of redeeming its preferred stock (Pl. Ex. 1, R. 481-482). Its backlog of unfilled commercial orders on November 30, 1946, was over $27,860,000, of which about $9,000,000 was for structural steel and over $9,830,000 was for heavy pipe.[17] This backlog of orders does not include Consolidated's contract to supply pipe for the Trans-Arabian pipe line, the dollar value of which is about $28,750,000 (R. 290-292, 407; *infra*, p. 26).

U. S. Steel has stated that its need for fabricating facilities on the West Coast is one reason for its acquisition of Consolidated. U. S. Steel officials testified, and the district court found, that tentative plans to establish structural fabricating plants on the West Coast had been made before the war and that certain later developments—abolition of land grant rates, increase in freight charges on shipments of structural steel from eastern points to the West Coast, and establishment of a base price at Geneva for rolled steel products—have increased the disadvantage of eastern fabricators in competing with far western fabricators in the Consolidated market.[18] U. S. Steel's other stated reason

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[16] If Consolidated so elects, the purchaser is to make an advance payment on account of these items, on the closing date, of $5,000,000 or 75% of book value, whichever is lower (Pl. Ex. 1, R. 463).

[17] Consolidated's unfilled commercial orders as of November 30, 1946 (Pl. Ex. 2, R. 508-510):

Company	Structural	Heavy Pipe	Total
Consolidated (parent company)	$5,892,436	$6,134,677	$15,500,354
Western Pipe & Steel Co.	277,185	3,622,703	7,763,145
Steel Tank & Pipe Co.	21,950	72,699	785,967
Consolidated Corp. of Texas	2,824,999	—	3,817,346
	$9,016,570	$9,[illegible]30,079	$27,866,812

[18] R. [illegible]6-167, 199-201, 375-376, Def. Ex. 36 (R. 588); Findings 30-34 (R. 45).

for the Consolidated acquisition is to assure that its subsidiaries will supply all the rolled steel products required in Consolidated's business (*supra*, p. 9).

Effects of Acquisition of Consolidated by U. S. Steel

(1) *Restraint on Commerce in Rolled Steel Products*

One of the major issues in this case is whether acquisition of Consolidated by U. S. Steel will eliminate substantial competition in the sale of rolled steel products by permanently eliminating Consolidated as a purchaser of such products from others than U. S. Steel. U. S. Steel has admitted that if the acquisition is consummated it will supply "the entire demand of the acquired business for rolled steel products" except for such items as it does not produce, and that one major purpose of the acquisition is to supply an outlet for the rolled steel products of its Geneva plant (R. 21). The only factual matter in controversy in the present connection, therefore, is the effect upon others of preemption by U. S. Steel of the business of supplying Consolidated's requirements of rolled steel products.

The district court approached this question, both in its opinion and findings, by comparing, for the prewar years 1937-1941 and for 1946, (a) Consolidated's total purchases of rolled steel products with total national production, (b) its purchases from U. S. Steel with U. S. Steel's total production, and (c) its purchases from others than U. S. Steel with total national production by others than U. S. Steel (R. 59-60; Fngs. 11-12, R. 37-38). Such comparisons are, we submit, meaningless. Preemption of Consolidated's purchases affects only that part of national production which normally can and does serve Consolidated's plants. The geographical location of the producing plants with reference to Consolidated's plants, which are nearly all in California, is a factor of decisive importance. The im-

portance of this geographical factor, recognized and admitted by U. S. Steel as a prime reason for this acquisition, was wholly ignored in the comparisons made by the district court.

The decisiveness of the factor of geographical location is shown by the fact that during the period considered by the district court (1937-1941, 1946), 95% of Consolidated's purchases of rolled steel products from U. S. Steel came from Columbia, a West Coast producer, and 5% from the three other subsidiaries of U. S. Steel engaged in making and selling rolled steel products. Such purchases were as follows:[19]

Seller	*Tons Purchased*
American Steel & Wire Co.	0
Carnegie-Illinois Steel Corp.	9,500
Tennessee Coal, Iron & Railroad Co.	6,859
Columbia	333,865
Total	350,224

During the same non-war years West Coast producers furnished 80% of the rolled steel products purchased by Consolidated, as shown by the purchases (in tons) listed below (Pl. Ex. 2, R. 511-512).[20]

The district court also compared, for the year 1940 and for the year 1946, the sales of rolled steel products to Con-

[19] As to the subsidiaries making and selling rolled steel products, see Pl. Ex. 4, R. 515-520. Consolidated's purchases are computed from the figures in Pl. Ex. 2, R. 511-512.

[20]

	Purchases from West Coast Producers				Total
	Bethlehem	Columbia	Kaiser Co.	Total	Purchases
1937	36,562	59,677	....	96,239	103,286
1938	16,770	23,240	....	40,010	44,050
1939	19,290	43,179	....	62,469	69,862
1940	34,126	50,081	....	84,207	117,644
1941	44,603	75,789	....	129,392	163,428
1946	35,591	81,899	19,411	136,901	178,669
Totals	186,942	333,865	19,411	540,218	676,939

solidated by the companies described as its "major suppliers", (other than U. S. Steel) with the total sales of the same companies (Fng. 15, R. 38). This comparison is subject to even greater infirmities than the one just considered. A company's total sales do not, of course, even approximate its sales of rolled steel products.[21] In the second place, most of the companies included in the tabulation are not, even in the most fanciful sense, "major suppliers" of Consolidated. For example, the so-called major suppliers for 1946 include Allegheny-Ludlum Steel Company and Youngstown Sheet and Tube Company, whose respective sales of rolled steel to Consolidated were \$7,938 and \$15,045 (Def. Ex. 63, R. 622-3). Their combined sales of \$22,983 were less than one-fifth of 1% of the \$10,807,371 sales of rolled steel products to Consolidated in 1946 (Pl. Ex. 2, R. 513-514), but their national sales of over \$310,000,000 are nevertheless included in the figures used by the district court.

The district court found that during the 1937-1941 period Consolidated's purchases of rolled steel products were 2.4% of the consumption of these products in the Consolidated market and that its 1946 purchases were 3% of such consumption in 1946 (Fng. 13, R. 38). Its opinion states that Consolidated's purchases were 1.38% of such consumption for the period 1937-1946 (R. 60). The figures on consumption are taken from Defendants' Exhibit 43 (R. 594). Cross-examination of the witness who prepared this exhibit (R. 255-268) and the notes on the face of the exhibit show the

[21] The district court's figures are taken from Defendant's Exhibit 63 (R. 622) and the source of total sales, as there given, is "Moody's Industrials." The note appended to the corresponding 1946 sales figure for Bethlehem reads: "Aggregate net amount billed for products shipped, revenue from transportation companies and other classes of business and services, less returns, commissions and other allowances" (Moody's 1947 Industrial Manual, p. 2889).

large element of conjecture and hypothesis entering into its computation. A more serious objection, however, is that it is largely based upon rail shipments under certain I.C.C. commodity classifications, one of which, 513, has at least 30 sub-classifications which are not rolled steel products (R. 260-261). All the remaining sub-classifications with the exception of tin and terne plate have the designation "Iron or Steel" (*ibid.*), and iron products are obviously not steel products.

To determine the role played by Consolidated as a purchaser of rolled steel products, it is necessary to do what the district court failed to do, namely, look at the types of such products which Consolidated primarily uses. These are plates and structural shapes. In the 1937-1941 period, out of Consolidated's total purchases of 498,270 tons of steel products, 379,050 tons, or 76%, were plates and shapes; out of its total 1946 purchases of 178,669 tons of steel products, 150,898 tons, or 84%, were of plates and shapes.[22] Figures on plate and shape consumption in the seven western states (California, Oregon, Washington, Idaho, Nevada, Utah, and Arizona) in which Geneva is expected to market its products are available only for 1937, when such consumption was 345,600 (Def. Ex. 42, R. 593). In that year Consolidated purchased 72,798 tons of plates or shapes. Its purchases were therefore 21% of total consumption in the seven state area. The estimated total post-war market in the seven Western states is about 227,000 tons of plates and about 213,000 tons of structural shapes per year, or together about 440,000 tons (Def. Ex. 64, R. 652). Since Consolidated in 1946 purchased a total of 150,898 tons of these two products, its total purchases in that year were 34% of the total

[22] The figures in this paragraph on Consolidated's purchases are all taken from or computed from the figures in Defendants' Exhibit 44A (R. 595).

estimated annual postwar consumption in the Pacific Coast area; and in 1946 its purchases of plates were 107,128 tons, or 47% of the estimated annual post-war consumption of plates in the Pacific Coast area.[28]

The importance of Consolidated in the Pacific Coast area as a consumer of the types of rolled steel products used by steel fabricators is shown by the fact that, of the 20 largest steel fabricators on the Pacific Coast, its purchases from U. S. Steel subsidiaries have been far in excess of those of any other such fabricator (Pr. Ex. 28, R. 562). In 1939 the purchases (in tons) of the five leading purchasers were as follows (*ibid.*):

1. Consolidated:		
Parent Company	19,750	
Western Pipe and Steel	26,654	
Steel Tank & Pipe	242	
		46,646
2. Moore Dry Dock Co.		20,307
3. Pacific Car & Foundry		6,956
4. Herrick Iron Works		6,422
5. Poole & McGonigle Steel Co.		4,605

In the first six months of 1946 the tonnage purchases of the five largest purchasers were (*ibid.*):

1. Consolidated:		
Parent Company	16,911	
Western Pipe and Steel	4,322	
Steel Tank & Pipe	297	
		21,530

[28] The above comparisons are, we think, of significance, even though it is assumed that 1946 was not representative of the normal postwar consumption to which U. S. Steel's estimates referred.

2. United Concrete Pipe Corp.	5,580
3. Basalt Rock Co.	3,736
4. Palm Iron & Bridge Works	3,514
5. Pacific Iron & Steel Co.	3,344

* Western Pipe also purchased 6,758 tons for shipbuilding.

In the first four months of 1947 Consolidated bought from U. S. Steel's Geneva plant from ten to fifteen thousand tons of plates and structural shapes per month (R. 406-407). This represented from 20% to 30% of Geneva's total shipments of 201,546 tons of plates and structural shapes during the same four months (Pl. Ex. 29, R. 563).

(2) *Elimination of Competition in the Sale of Structural Steel Products*

Total bookings of structural steel products in the Consolidated market for the years 1937-1942 were 1,665,698 tons, of which 283,825 tons were booked by U. S. Steel and 84,533 tons by Consolidated (Def. Ex. 50, R. 600-601).[24] U. S. Steel's share of the total was therefore 17% and Consolidated's share was 5%, and U. S. Steel's average bookings per year were 47,304 tons and Consolidated's were 14,089 tons. The two companies together had 22% of the business and Consolidated's bookings were 30% of U. S. Steel's.

In 1946 U. S. Steel's bookings of structural steel products in the Consolidated market were 44,083 tons (Def. Ex. 50, R. 601), a decline of 7% from its average bookings in 1937-1942. The corresponding bookings of Consolidated in 1946 were 36,142 tons (Pl. Ex. 30, R. 563), an increase

[24] Total bookings are those reported by the American Institute of Steel Construction and this data is not available for the years 1943-1946 (Def. Ex. 50, R. 601). Consolidated's bookings for 1937-1939 do not include those of its subsidiary, Western Pipe & Steel Company (*ibid.*).

of 163% from its average in the earlier period. In 1946 not only were Consolidated's bookings of structural steel products in the Consolidated market 82% of U. S. Steel's bookings, but they exceeded the 1946 bookings in that market of any other structural steel fabricator (Pl. Ex. 31, R. 564).[25]

By reason of changes of a permanent character occurring since the 1937-1942 period, the above 1946 figures furnish a much more reliable index than those for the earlier period, as to present and future competitive conditions in the Consolidated market with reference to sale of structural steel products. On the one hand, Consolidated's war work of over $1,500,000,000 has enormously increased its financial and competitive strength. On August 31, 1946, it had net current assets of over $15,000,000 and earned surplus of over $8,350,000 (notwithstanding previous charges to surplus of over $3,500,000 for the retirement of preferred stock) and its unfilled commercial orders on November 30, 1946, were over $27,000,000 (Pl. Ex. 2, R. 508-510; *supra*, p. 13). On the other hand, U. S. Steel's structural steel business in the Consolidated market had been adversely affected, as compared with the earlier period, by the abolition of land grant rates, by increase in freight rates on shipments of structural steel products to the Pacific Coast, and by the establishment of Geneva as a price basing point for the rolled steel products used by fabricators of structural steel (*supra*, p. 13).

Appellees introduced in evidence an exhibit (Def. Ex. 57, R. 612), which the district court incorporated in its findings (Fng. 24, R. 41-43), giving data on structural steel jobs in the Consolidated market on which U. S. Steel and Consolidated both bid during the 10-year period 1937-1946.

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[25] They were approximately the same as those of Bethlehem Steel, the company with the next largest bookings (Pl. Ex. 31, R. 564).

Consolidated made bids and obtained awards in each of the 12 classifications shown by this exhibit (Def. Ex. 56, R. 610-611). One classification is applicable only to Consolidated[26] and in one classification, Tier Buildings,[27] U. S. Steel and Consolidated did not both bid on any of the same jobs (Def. Ex. 57, R. 612). In each of the other 10 classifications there were "common" bids for the same jobs and, of such "common" bids, Consolidated was the successful bidder on certain jobs in every classification except two comparatively minor ones (*ibid.*).[28] It thus appears that Consolidated's competition covered the entire gamut of U. S. Steel's structural steel business.

The exhibit referred to above shows that both companies bid on 166 jobs involving 122,353 tons; that 40 of these jobs, involving 38,920 tons, were awarded to U. S. Steel; and that 35 jobs, involving 24,162 tons, were awarded to Consolidated. The fact that one or the other company captured more than half of the tonnage of the jobs on which both bid indicates how serious a diminution of competition there would be if either company absorbed the other and eliminated it as a competitor.

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[26] This classification is entitled "Additional Fabricated Structural Products of Consolidated" (Def. Ex. 56, R. 610-611) and U. S. Steel made no bids, either in common with Consolidated or otherwise, under this classification (Def. Ex. 54, R. 606-607). It is evidently designed as a catch-all for Consolidated products not coming under the classifications into which U. S. Steel divided its own products.

[27] Notwithstanding the absence of "common" bids in the case of tier buildings, Consolidated was a substantial competitor for structural steel for such buildings. In the 1937-1946 period it bid on 24 jobs for tier buildings and received 13 awards for a total of 9392 tons (Def. Ex. 55, R. 608-609).

[28] The two classifications in which Consolidated received no awards for jobs on which U. S. Steel was also a bidder, Buildings for Powerhouses and Towers & Electric Substations, account for less than 10% of the jobs, and hardly more than 10% of the tonnage of all U. S. Steel bids in the Consolidated market (Def. Ex. 54, R. 606-607).

Another fact demonstrates the important competitive effect of the competition between U. S. Steel and Consolidated. Each obtained the award of a much higher percentage of the jobs on which the other did not bid than of the jobs on which both bid, as shown by the following table.[29]

	U. S. Steel		Consolidated	
	All jobs bid	Common bids	All jobs bid	Common bids
Number of bids	2,409	166	6,377	166
Number of jobs awarded	839	40	2,390	35
% of award to bids	34.8	24.1	37.5	21.1

Jobs on which U. S. Steel and Consolidated both bid were, in general, the larger contracts. The average tonnage of the jobs on which both bid was 737, while the average tonnage of *all* jobs on which U. S. Steel bid was only 528 and the average tonnage of *all* jobs on which Consolidated bid was only 91.[30] Thus U. S. Steel encountered Consolidated competition primarily in the larger jobs which U. S. Steel sought.

The data concerning common bids furnishes no information which would disclose whether or not the competition between U. S. Steel and Consolidated was more intense in certain parts of the Consolidated market than in the market as a whole. Other facts nevertheless show that this unquestionably was the case. Of the total business in the Consolidated market captured by U. S. Steel 30% was in California, while of the total business in this market captured by Consolidated 75% was in California.[31]

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[29] The figures are taken from Defendants' Exhibits 54, 56 and 57 (R. 606-612).

[30] Tonnage of common bids, 122,353; number of bids, 166 (Def. Ex. 57, R. 612). Tonnage of all U. S. Steel bids, 1,273,152; number of U. S. Steel bids, 2,409 (Def. Ex. 54, R. 607). Tonnage of all Consolidated bids, 578,847; number of Consolidated bids, 6,377 (Def. Ex. 56, R. 611).

[31] Tonnage all U. S. Steel awards, 499,605; tonnage California awards, 147,589 (Def. Ex. 53, R. 604-605). Tonnage all Consolidated awards, 159,997; tonnage California awards, 119,477 (Def. Ex. 55, R. 608-609).

Figures for 1946 furnish a much more certain guide to present and future competition between U. S. Steel and Consolidated than do over-all figures for the 1937-1946 period (*supra*, p. 20). In this connection, the following figures on tonnage of common bids for structural steel in the Consolidated market (Def. Ex. 62, R. 618-621) speak for themselves:

	Average 1937-1946	1946
Bids	12,235	29,934
Awarded U. S. Steel or Consolidated	6,308	18,127

The information furnished by appellees on common bids does not disclose the amount involved in the awards on such bids, the number of bidders, or the margin between the low bid and the next lowest bid. The Government put in evidence summaries of the bids for structural steel work in the Consolidated market submitted to the Bureau of Reclamation of the Department of the Interior on 14 projects on which U. S. Steel and Consolidated both bid (Pl. Exs. 14-27, R. 547-560). On one project these companies were the only bidders (Pl. Ex. 21), on three there was only one other bidder (Pl. Exs. 20, 23, 26) and on four there were only two other bidders (Pl. Exs. 15, 18, 22, 27). The low bids totalled $2,365,231 and the next lowest bids totalled $2,799,729, a difference of $434,498, and in eight of the 12 cases in which the award went to the low bidder, the two lowest bidders were U. S. Steel and Consolidated, as shown by the following table:

Pl. Ex. No.	Lowest Company	Lowest Bid	Second Company	Second Bid	Third Company	Third Bid
14	U. S. Steel	$169,305.00	Consolidated	$219,430.00	Koppers	$238,430.00
15	Consolidated	168,145.60	U. S. Steel	177,598.60	Treadwell Const. Co.	220,053.90
16	Consolidated	9,695.00	U. S. Steel	10,005.07	Calif. Stl. Prod. Co.	11,270.19
17	Consolidated	21,543.14	Calif. Stl. Prod. Co.	21,862.40	U. S. Steel[1]	22,463.00
18	U. S. Steel	217,310.74	Consolidated	231,686.35	Koppers	247,184.06
19[2]	U. S. Steel	22,457.40	Consolidated	23,258.40	Continental Bridge Co.	25,21[illegible].00
20	U. S. Steel	491,505.99	Treadwell	658,857.00	Consolidated	732,649.04
21	U. S. Steel	167,815.20	Consolidated	177,574.05	None	
22	U. S. Steel	197,636.82	Consolidated	240,735.00	Independent Iron Works	286,841.80
23	Consolidated	20,530.50	U. S. Steel	20,533.92	Treadwell	22,056.80
24	U. S. Steel	11,914.83	Milwaukee Bridge Co.	12,423.13	Omaha Steel Works	12,901.67
25	A. M. Meyerstein	158,221.61	U. S. Steel[1]	203,314.68	Consolidated	212,982.40
26	Consolidated	575,000.00	Koppers	603,718.78	U. S. Steel	636,761.80
27[3]	Consolidated	134,150.00	Judson Pacific Murphy Corp.	198,733.00	U. S. Steel	236,330.00
Totals		$2,365,231.83		$2,799,729.78		$2,905,141.66

[1] Awarded bid, although not low bidder.

[2] Item 1 of Exhibit 19 (R. 552). The bid summary on this shows a second item on which both Consolidated and U. S. Steel were underbid by three other concerns. Neither of them was awarded that item, but the award for item 1 went to U. S. Steel (R. 228).

[3] This job was omitted from defendant's tabulation of all jobs bid by U. S. Steel (Def. Exs. 24–37, not printed) because it involved only the furnishing of fabricating services not accompanied by a sale of fabricated materials (R. 231–232).

The foregoing facts and figures, all relating to bids which were opened in the period October 1945-January 1947, show more concretely than anything else in the record the existing competition between U. S. Steel and Consolidated in the sale of fabricated steel products. The proof that in certain types of these products, such as those involved in the Bureau of Reclamation projects, U. S. Steel and Consolidated are the principal competitors is in no way offset by certain facts found by the district court—that during a 10-year period 100 different concerns had at one time or another bid successfully against U. S. Steel in the Consolidated market, that 90 different concerns have sold structural steel in that market during 1946, and that 62 concerns have plants for fabricating structural steel located in the Consolidated market (Fng. 36, R. 46).

(3) *Elimination of Competition in the Sale of Pipe*

National Tube Company, a U. S. Steel subsidiary, makes pipe ranging in size from two to 26 inches in diameter and Consolidated makes pipe ranging in size from four to 30 inches in diameter (R. 280-281, 286). Both make pipe for the transportation of oil and gas (R. 282-283, 287, 289-290). National Tube makes pipe by a seamless process and Consolidated uses an electric welding process in making its pipe (R. 279-280, 286), but the pipes of the two concerns perform the same service and the primary differentiating characteristic is that some of the pipe made by Consolidated is larger in size than any made by National Tube (R. 286-287).

Consolidated's sales of pipe for the period January 1, 1937, to August 31, 1946, were over $27,600,000 (Def. Ex. 60, R. 615). Very recently its business as a supplier of pipe for oil and gas lines has enormously expanded. On November 30, 1946, its unfilled orders for heavy pipe were

over $9,800,000 (*supra*, p. 13). At the time of trial it was furnishing pipe for the Southern Counties and Southern California gas line (R. 408); it had procured in 1947 a contract to provide 90% of the pipe for the Trans-Arabian pipe line, which is 1100 miles long (R. 289-291); and it had obtained orders to supply pipe for a trunk line being built by the El Paso Natural Gas Company (R. 282) and for a pipe line being built by the Pacific Gas and Electric Company (R. 283).

The pipe for the El Paso line was 26 inches and that for the Pacific Gas & Electric line 24 inches, and National Tube was furnishing part of the pipe for each of these lines (R. 282-283). The dollar value of Consolidated's Trans-Arabian pipe line order is about $28,750,000 (R. 291-292, 407) and this pipe line is similar to the 1,250 miles long Big Inch pipe line for which National Tube furnished 90% of the pipe (R. 293).

There was testimony that National Tube's price for its 24-inch or 26-inch pipe is considerably less than Consolidated's price for pipe of these sizes, and that the reason why Consolidated was able to sell pipe for the El Paso and the Pacific Gas & Electric pipe lines was because the purchasers wanted prompt delivery and could not get their full requirements from other sources (R. 282-283, 340-341). But such testimony does not overbear the undisputed fact that National Tube and Consolidated both make pipe suitable for oil and gas pipe lines and that both have sold pipe of the same dimensions for the same pipe lines.

The two companies are thus directly competitive as to business which unquestionably is substantial. A holding that they are not competitive must be predicated upon the assumption that, as to the sizes of pipe which both make, National Tube will hereafter have an advantage in cost of manufacture sufficient to make Consolidated substantially

non-competitive.[32] But if plain evidence of competition is to be rejected upon the basis of a speculative assumption, it at least must be one reasonably to be inferred from the evidence. Here, however, the pertinent evidence points in the opposite direction. Consolidated has recently obtained an unprecedented volume of pipe business and it has constructed additional facilities to handle this business.[33] These circumstances would normally lead to a material reduction in Consolidated's per-unit cost of manufacture.

National Tube has had a patent, under which Consolidated has been licensed, on the welding process used by Consolidated in making its pipe (R. 287-288). This patent expired in November 1947 so that National Tube is no longer in a position to exercise any patent control over Consolidated's manufacture of pipe.

While the district court made the conclusory finding that National Tube and Consolidated do not compete in the sale of pipe products (Fng. 20, R. 40), the finding lacks the support of subsidiary evidentiary findings.

SPECIFICATIONS OF ERRORS TO BE URGED

Appellant specifies as errors to be urged each of the errors assigned (R. 68-72) except those numbered 15, 17, 26 and 33 (R. 70-72).

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[32] A holding based on such assumption would, however, be open to the further objection that it would disregard the element of potential competition in respect of pipe of the somewhat larger size, 30 inches, now made by Consolidated but not by National Tube.

[33] Not only has Consolidated expanded its facilities for making pipe (R. 293, 360), but the acquisition agreement of December 14, 1946, states that Consolidated has made or will make expenditures of approximately $700,000 to install facilities (not shown on its books as of August 31, 1946) for carrying out its pipe line contracts (Pl. Ex. 1, R. 463-464). In addition, Consolidated has obtained large pipe orders subsequent to this agreement (R. 291-292).

SUMMARY OF ARGUMENT

I

A major purpose of U. S. Steel in acquiring Consolidated is to preempt for itself the business of supplying all the rolled steel used in the operation of Consolidated's plants. U. S. Steel's calculated preemption of this important segment of the market excludes its competitors from the sale of rolled steel products to Consolidated and eliminates it as a market outlet for their products. Since U. S. Steel considers that securing a monopoly of Consolidated's purchases is a near-essential to profitable operation of its rolled steel plant at Geneva, by a parity of reasoning other West Coast producers of rolled steel will be injured to a corresponding or greater degree by complete loss of this market outlet.

The preemption of the market in this case is identical in character with that condemned by this Court in *United States* v. *Yellow Cab Co.*, 332 U. S. 218, where a manufacturer of taxicabs acquired control of the principal companies operating taxicabs in four large cities in order to have assured outlets for sales of taxicabs. But U. S. Steel's acquisition affects a greater volume of commerce and brings about a far more serious restraint than did the acquisitions in the *Yellow Cab* case. Consolidated is by far the largest independent purchaser of rolled steel products in the 11-State area in which it operates. In the ten-year period ending with 1946 it purchased rolled steel products costing about $114,000,000. Its 1946 consumption of steel plates, the principal type of rolled steel product which it requires, was 47% of the estimated annual post-war consumption of plates in the Pacific Coast area.

Loss of Consolidated's purchases is not one which would be widely borne but would have principal impact on a few West Coast producers. And since U. S. Steel has over 50%

of the ingot capacity of the Pacific Coast area, acquisition of Consolidated would tie the largest independent consumer in the area to the largest producer.

II

A. Competition of U. S. Steel and Consolidated in the sale of structural steel products in the Consolidated market covers practically the entire gamut of such products. U. S. Steel is the leader in this field; Consolidated is the second or third largest seller; of the awards obtained by these two on jobs for which both bid, Consolidated captured about 47%; U. S. Steel has been significantly less successful in obtaining awards when Consolidated was also a bidder than when it was not; recent developments have increased the potency of Consolidated's competition; and with respect to the only jobs on which both companies bid for which the record furnishes detailed data, U. S. Steel and Consolidated were the two outstanding and only really significant competitors. Such facts demonstrate the serious inroads on competition which would result from eliminating Consolidated as a market factor. Furthermore, the competitive effect which U. S. Steel and Consolidated assert upon each other may not be measured solely by the instances in which both bid upon the same job. Each, in determining the jobs on which to bid and the amount to bid, necessarily takes into consideration the possible or probable bid of the other.

B. Both companies make and sell pipe for oil and gas pipe lines and in some instances each has supplied part of the pipe for a particular line. Not only are they among the leading suppliers but there are only a very limited number of companies in the whole country equipped to make pipe for long distance oil and gas pipe lines. Consolidated's entry into this field, while comparatively recent, has been highly successful. On one pipe line project alone, similar

in every material respect to one for which U. S. Steel furnished 90% of the pipe, Consolidated has a contract to supply pipe at a cost over $27,000,000. Even as to pipe of certain diameters for which U. S. Steel's current price is lower than Consolidated's, Consolidated's more costly but larger pipe offers prospective purchasers a clear competitive choice which the acquisition of Consolidated would forever destroy.

C. U. S. Steel and Consolidated each now produces scores of finished steel products and in this field the possibilities of competition between them, unless they combine, are almost limitless. U. S. Steel obviously has the financial and technical resources to enable it to manufacture additional steel products of any kind. Consolidated's production during the war period of steel ships for which it received over $1,500,000,000 demonstrates that it likewise has the ability (aided by its present strong financial position) to engage in large-scale manufacture of new steel products when and if this seems advantageous.

D. Congress passed the Sherman Act primarily to prevent the evils deemed to arise from suppression of competition by means of corporate combinations, "trusts" or any other device employed to bring independent businesses under unified control. Since acquisition of one company by another completely suppresses competition between them for all future time, the restraint of trade flowing from this form of combination falls directly within the purview of the statute. Consistently with these principles, this Court has repeatedly held that a merger or union of independent concerns under single ownership is a combination in restraint of trade forbidden by Section 1 of the Act if the competition thereby suppressed is substantial in amount or represents an appreciable segment of interstate trade.

To a combination of the foregoing kind, the so-called "rule of reason" enunciated in *Standard Oil Co.* v. *United States*, 221 U. S. 1, has little, if any, application. The gist of this rule is that the kinds of restraints and monopolizations which the Act prohibits are to be determined with reference to the evils against which the statute is directed and to the common law doctrines from which some of its terms are derived. The *Standard Oil* case did not involve, as does the instant one, a combination whereby competition was suppressed by bringing independent concerns under single control; this aspect of the defendants' combination antedated enactment of the Sherman Act and subsequent thereto there was merely a change in the medium of control.

This Court has not undertaken to state definitively how much competition must be eliminated in order that the resulting restraint of trade should be sufficiently substantial or grave to come within the condemnation of the statute. It is clear, however, that the restraint may not be saved from illegality by a showing that the combining companies, although competitors for trade of substantial volume, were non-competitive as to much of the business in which they were engaged.

III

Whether or not U. S. Steel has achieved monopoly status, it has persistently followed a policy of expansion through absorption of previously independent concerns. Its frankly avowed purpose in acquiring Consolidated is to achieve full-line integration in its West Coast operations. We submit that in the light of this purpose and U. S. Steel's long history of acquisition and combination, the instant acquisition, which would buttress and substantially increase U. S. Steel's already dominant position in the sale of fabricated steel products in the Consolidated market, constitutes an

attempt to monopolize a part of interstate commerce prohibited by Section 2 of the Sherman Act.

ARGUMENT

I

The acquisition agreement, the purpose and effect of which is to exclude all companies other than U. S. Steel from the business of supplying Consolidated's requirements of rolled steel products, is in illegal restraint of interstate commerce

The acquisition of Consolidated by U. S. Steel is intended to prevent and will prevent all manufacturers of rolled steel products other than U. S. Steel from selling their products to Consolidated. Appellees admit that a major purpose of U. S. Steel in acquiring Consolidated is to procure for itself the entire business of supplying all rolled steel products needed in the operation of the acquired enterprise and they admit that, upon consummation of the acquisition, they will be able to effectuate this purpose (*supra*, p. 14). The situation is therefore identical with an aspect of the combination which was before this Court in *United States* v. *Yellow Cab Co.*, 332 U. S. 218, which was adjudged illegal.

That case came here on appeal from a decision dismissing the complaint for failure to state a cause of action. The facts presently pertinent are that a manufacturer of taxicabs and certain others combined to acquire control of the principal companies operating taxicabs in four large cities; that the purpose of the acquisition was to require the acquired companies to purchase all of their taxicabs from the defendant manufacturer; and that the defendants had successfully effectuated such purpose. In holding that a combination of this character falls within the ban of the Sherman Act, this Court said (p. 226):

> By excluding all cab manufacturers other than CCM from that part of the market represented by the cab

operating companies under their control, the appellees effectively limit the outlets through which cabs may be sold in interstate commerce. Limitations of that nature have been condemned time and again as violative of the Act.

In the *Yellow Cab* case acquisition of stock control was the medium employed in bringing about the intended restraint of commerce; here the medium employed is acquisition of the physical assets and good will of a going business. This factual difference is not a ground for differentiation. This Court has emphatically declared that what violates the Sherman Act depends upon the actual restraint or monopolization effected, not upon the form which the transaction takes or the garb in which it is clothed.[34]

In the *Yellow Cab* case the Court pointed out that the defendants' combination, in addition to illegally restraining the trade of all cab manufacturers other than the defendant manufacturer, denied to the controlled operating companies the opportunity to purchase their taxicabs in a free, competitive market. And the Court held (p. 227) that the Sherman Act inhibits "such a conspiracy to restrain the free purchase of goods in interstate commerce." We submit that this additional element of illegality is also present here. U. S. Steel is purchasing, not particular physical assets as such, but a going business with the assets which are a part of it.[35] Reincorporation of the business will not,

[34] *United States* v. *American Tobacco Co.*, 221 U. S. 106, 181; *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344, 360, 376-377; *United States* v. *Yellow Cab Co.*, 332 U. S. 218, 227.

[35] The acquisition agreement of December 14, 1946 provides (Pl. Ex. 1, R. 455):

> The Sellers agree to sell, and the Buyer agrees to buy, certain *business*, property and assets of the Sellers, namely, the "transfer assets" hereinafter defined, and the *business* of the Sellers relating to the transfer assets *as a going concern* (including * * * the right to use the corporate name of any one of the Sellers * * *). [Italics supplied.]

of course, affect its continuity. As a consequence of the proposed acquisition, the successor corporation or corporations operating Consolidated's business will, like the operating companies in the *Yellow Cab* case, be restrained from freely purchasing their goods in interstate commerce.

A circumstance upon which appellees and the district court have heavily relied—that Consolidated's consumption of rolled steel products represents only a minor fraction of the national output—is disposed of by the *Yellow Cab* decision. The Court there said (p. 225) that in determining whether there has been a violation of the Sherman Act the amount of interstate trade affected by the conspiracy "is immaterial" and that "it is enough if some appreciable part of interstate commerce is the subject of a monopoly, a restraint or a conspiracy." The Court further said (p. 226):

> Likewise irrelevant is the importance of the interstate commerce affected in relation to the entire amount of that type of commerce in the United States. The Sherman Act is concerned with more than the large, nation-wide obstacles in the channels of interstate trade. It is designed to sweep away all appreciable obstructions so that the statutory policy of free trade might be effectively achieved.

The acquisition now under consideration affects a greater volume of commerce and brings about a more serious restraint of commerce than the acquisitions involved in the *Yellow Cab case.* As to volume of commerce, U. S. Steel estimates the annual future sales of the business sought to be acquired at $22,000,000 (*supra,* p. 12), whereas the commerce restrained in the *Yellow Cab* case was replacement purchases of some 5,000 taxicabs (332 U. S. 218, 225).[38] As

[38] The Government's brief in the *Yellow Cab* case stated (p. 37) that the evidence indicated that such purchases would be about $3,000,000 annually.

to the seriousness of the restraint on commerce in rolled steel products flowing from the acquisition of Consolidated, the following facts are pertinent:

U. S. Steel now has over 50% of the total ingot capacity of the Pacific Coast area (*supra*, p. 9). U. S. Steel asserts that, in order to assure profitable operation of its steel-making plants in that area, it needs to secure for itself all of Consolidated's purchases of rolled steel products (*supra*, p. 9). The full amount of additional business which the acquisition would bring to U. S. Steel would necessarily be taken from other producers, and chiefly from West Coast producers. Obviously to close Consolidated as an outlet for their products would seriously restrain their trade; in 1946 Consolidated's total consumption of plates was 47% of the estimated annual post-war consumption of plates in the Pacific Coast area (*supra*, pp. 17-18). The very fact that the plate productive capacity of that area is now greatly in excess of the normal demand for this product within the area (as estimated by U. S. Steel) increases the seriousness of the restraint. This excess plate capacity is a recent development, caused by the construction during the war of two very large steel plants in the Pacific Coast area—both financed by the Government and both built to furnish plates for shipbuilding—one the plant at Geneva now owned by U. S. Steel and the other a plant at Fontana, California, presently owned by the Kaiser Company.[37]

In the foregoing circumstances, the restraint which would result from irrevocably tying the largest independent consumer of plates in the Pacific Coast area to the largest plate producer serving the area is incomparably more serious than the restraint resulting from tying the purchasers of some 5,000 taxicabs to a relatively small manufacturer of

[37] Senate Rep. 199, pt. 3, 79th Cong., 1st sess., *War Plants Disposal: Iron and Steel Plants*, p. 20. This Senate Report is the source of part of the data in Defendants' Exhibit 43 (R. 594).

cabs. The latter restraint has been held illegal. *A fortiori* the former must be deemed illegal.

In the present case not only will the proposed acquisition of Consolidated effect a monopolization of its purchases of rolled steel products but this admittedly is the primary object of the acquisition. This is an instance, therefore, where dominating power over a previously independent company would be obtained, not "by normal expansion to meet the demands of a business growing as a result of superior and enterprising management, but by deliberate, calculated purchase for control." See *United States* v. *Reading Co.*, 253 U. S. 26, 57; *United States* v. *Yellow Cab Co.*, 332 U. S. 218, 227-228.

Here, no more than in the two cases cited above, can the acquisition be explained in terms of meeting the needs of a business growing by virtue of its success in the competitive struggle. It is true that U. S. Steel has recently acquired a plant at Geneva the profitable operation of which will be promoted if, through the acquisition of Consolidated, all of its requirements for rolled steel can be channeled to the steel-making plants of U. S. Steel. But in like manner in the *Reading* case, the defendant holding company, having railroad subsidiaries which served the anthracite coal fields, promoted their profitable operation when it acquired various coal companies and thus secured for its railroad subsidiaries the business of transporting their coal to market. Similarly in the *Yellow Cab* case, the acquisition of companies operating taxicabs served to provide an assured outlet for the product of the defendant cab manufacturer.

Finally, we note that U. S. Steel is an outstanding example of vertical integration. It is engaged in mining the raw material for making ingots, manufacturing ingots, turning ingots into rolled steel products, making finished steel products out of rolled steel, and transporting raw materials and products to and from producing plants

(*supra*, p. 7). Appellees' defense comes down to this: When a vertically integrated concern such as U. S. Steel has plant capacity at one stage of production greater than that which its plants at the next stage can absorb, then it should be free from any barriers interposed by the Sherman Act if it absorbs a competitor and thereby brings its capacity at the finished-steel level into equilibrium with its capacity at the semi-finished-steel level. Under this view, size furnishes its own justification for further size, for doing what the statute might otherwise bar.

The decisions of this Court give no sanction to appellees' interpretation of the Act. To the contrary, this Court has declared that while mere size, when it falls short of monopoly, is not an offense against the Sherman Act, "size carries with it an opportunity for abuse" which is not to be ignored in determining the application of the statutory prohibitions. *United States* v. *Swift & Co.*, 286 U. S. 106, 116.

If the acquisition of Consolidated by U. S. Steel is barred as being in violation of the Sherman Act, this does not mean that U. S. Steel's plants will lose Consolidated as an outlet for their products. It merely means that U. S. Steel will have to compete with others in the sale of rolled steel products to Consolidated. It is precisely this competition which U. S. Steel wishes to avoid. In answer to the question why it could not compete with other steel producers in the sale of steel to Consolidated, U. S. Steel replied (Pl. Ex. 8, R. 526):

> * * * it is believed, that United States Steel could continue to compete for the business of Consolidated so long as such business is available. There would, however, be no assurance that such business would be obtained by United States Steel and such assurance is the objective of the proposed acquisition.

II

Acquisition of Consolidated by U. S. Steel would eliminate substantial competition between them and would constitute a combination in illegal restraint of interstate commerce

A. *The Acquisition Would Eliminate Substantial Competition in the Sale of Structural Steel Products*

A structural steel product is made to meet the special requirements of a particular purchaser and therefore is a made-to-order product ordinarily sold on the basis of competitive bidding whether or not the purchaser is a public agency (Fng. 17, R. 39). These aspects of the business must be borne in mind in considering the facts which, as we believe, conclusively establish that U. S. Steel and Consolidated are in substantial competition in the sale of structural steel products.

Consolidated is competitive as to all structural steel products made by U. S. Steel. The latter concern has grouped the structural products which it sells under eleven classifications and in each of the eleven classifications Consolidated has submitted bids and obtained awards. In all but one of them, Consolidated and U. S. Steel have both bid on some of the same jobs and, on jobs on which both bid, Consolidated has obtained awards under every classification except two. Not only has Consolidated's competition thus covered the entire range of U. S. Steel's structural steel products, but it has been significantly successful in this competition. Of the 75 jobs on which there were common bids and the award went to one or the other company, Consolidated was successful in 35, or 46.7%, of such jobs. (*Supra*, pp. 20-21, 22.)

The inroads upon competition which would result from eliminating Consolidated as a competitor is evidenced by the fact that U. S. Steel obtained the award in only 24%

of the jobs on which both companies bid,—while on all jobs on which it bid in the Consolidated market it was successful in 35% (*supra*, p. 22). The average tonnage of the jobs on which both bid was appreciably greater than the average tonnage of all jobs in the Consolidated market on which U. S. Steel bid (*ibid.*). The competition between the two companies is, of course, in no way negatived by the fact that there were some tyes of structural steel products for which U. S. Steel did not ordinarily submit bids in the Consolidated market, namely, products of comparatively simple design and sold at a relatively low price per ton, as to which U. S. Steel's transportation costs are a high percentage of sales price (R. 161, 163).

In the aspect of the case now under consideration, the district court relied primarily upon figures and computations comparing all bids and all awards by U. S. Steel in the Consolidated market with the bids and awards on the particular jobs on which Consolidated was also a bidder. Such a comparison erroneously assumes that Consolidated is a competitive factor only as to the jobs on which it and U. S. Steel both bid (*infra*, p. 42). An equally serious defect is that the tests applied by the district court ignore factors which are of vital importance in determining the substantiality of the competition between the two companies. Data for the Consolidated market as a whole do not disclose the much greater degree of competition between them in certain parts of that market area, i.e., in California. Of all structural steel business done by Consolidated in the Consolidated market, 75% was in California, while of all such business by U. S. Steel in that market, only 30% was in California (*supra*, p. 22).[38] The figures for the ten-

[38] In California, the tonnage on which Consolidated bid was substantially greater than the tonnage on which U. S. Steel bid (Def. Exs. 53, 55, R. 604, 608).

year period which the district court used also fail to disclose that both companies bid on the same jobs to a much greater extent in 1946 than they did, on the average, in the ten-year period (*supra*, p. 23). This is of particular significance since the evidence establishes that there have been recent developments which greatly strengthen Consolidated's present and future competitive position vis-a-vis U. S. Steel (*supra*, p. 28—). Finally, the data used by the district court failed to show the dollar volume of the jobs on which both bid, the number of bidders, or the difference in amount between the low bidder and the second lowest.

Information of the above kind is furnished only by evidence introduced by the Government showing all of the bids submitted to one agency of the Federal Government on jobs bid by both U. S. Steel and Consolidated during a fifteen-month period shortly before the trial. In 8 of the 12 jobs which went to the lowest bidder, the *two* lowest bidders were U. S. Steel and Consolidated; in more than half of all the 14 jobs shown, the number of other bidders was two or less; and the dollar volume of the low bids on the 14 jobs was almost $1,400,000 (*supra*, pp. 23-24). Thus the only data setting forth, in detail, the competition between U. S. Steel and Consolidated for the business of a particular customer shows that acquisition of the latter by the former would, as to such business, eliminate from the market U. S. Steel's principal competitor and would give to it a large measure of price control in respect of a substantial volume of high-priced structural steel business.[39]

The over-all figures on structural steel business in the Consolidated market likewise establish the outstanding posi-

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[39] U. S. Steel has referred to Bethlehem as its principal competitor in the sale of structural steel in the Consolidated market, but Bethlehem did not bid on any of the 14 jobs covered by Plaintiff's Exhibits 14-27 (R. 547-560).

tion of U. S. Steel and Consolidated. Of total bookings of such products in that market for the years 1937-1946, U. S. Steel had 17% and Consolidated 5% (*supra*, p. 19). The 1946 bookings disclose that Consolidated had appreciably bettered its competitive position. In that year U. S. Steel's bookings were below its average for the ten-year period but Consolidated's bookings were more than one and one-half times greater than its average for the ten-year period (*supra*, pp. 19-20). Of the estimated total 1946 bookings of structural steel in the Consolidated market, those of U. S. Steel were largest, about 13%, and those of Consolidated were next largest, about 11% (Pl. Ex. 31, R. 564).[40]

It thus appears that the acquisition of Consolidated by U. S. Steel would permanently eliminate all competition between the leading company in the field and the company ranking second or third and would concentrate in the hands of one concern not only about 25% of the total business in structural steel products in the Consolidated market but a much higher percentage of the business in particular types of products and in particular portions of that market. An acquisition which so clearly eliminates substantial competition is, we submit, a combination in illegal restraint of trade. We also submit that this conclusion is in no respect negatived by the showing (see Fng. 36, R. 46) that many concerns sell structural steel products in the

[40] Plaintiff's Exhibit 31 gives Consolidated's bookings as 40,893 tons, which is a projection of its bookings for the first eight months of 1946 (R. 419, 430). Consolidated's bookings for the full year, as later supplied by the defendants, were 37,731 tons, of which 36,142 tons were of the AISC type included within Plaintiff's Exhibit 31 (R. 564; Pl. Ex. 30, R. 563). Substitution of the latter figure for the 40,893 tons shown in the exhibit would reduce the total bookings there shown to 336,717 tons and would make the five leading companies have the following percentages of the total: U. S. Steel 13.1%, Consolidated 10.7%, Bethlehem 10.7%, Mosher Steel Co. 8.9%, Chicago Bridge & Iron Co. 6.4%.

As to the sources and methods of computation used in preparing Plaintiff's Exhibit 31, see R. 564; Pl. Exs. 33-34 (R. 565-568).

Consolidated market. Those who offer only a limited range of products to purchasers located close to their plants are scarcely competitive with U. S. Steel for the complicated and costly types of products constituting most of its business in the area referred to as the Consolidated market (R. 161-163).

We also point out that the competitive effect which U. S. Steel and Consolidated exert upon each other is not confined to instances in which both bid on the same project. With respect to any given project, the knowledge of each that the other may have been solicited to bid, that the other can and has done work of this character, in short, that the other is "in the market," is a potent competitive force tending to keep prices close to cost and to assure reasonable service and quality. Neither can ever be assured, absent collusion between them, that the other will not bid on any particular job. Since there are few bids which either can submit in the Consolidated market in disregard of the other, the effect upon competition resulting from eliminating one of them from the market cannot be properly appraised by considering only the instances in which both submitted bids for the same job.

B. *The Acquisition Would Eliminate Substantial Competition in the Sale of Pipe Products*

Both Consolidated and U. S. Steel's subsidiary, National Tube, make and sell pipe of overlapping dimensions for use in pipe lines for the transportation of oil and gas for short or long distances (*supra*, p. 25). Each has had sales of pipe of this kind running into many millions of dollars and each has sold pipe meeting the specifications set for the pipe to be used in particular pipe lines (*supra*, pp 25-26). In view of these facts, established by uncontroverted evidence, the district court manifestly erred in its conclusory

finding, not supported by any subsidiary finding, that the two companies "do not compete in the sale of their pipe products" (Fng. 20, R. 40).[41]

The district court in its opinion stated that there was "no substantial competition" between U. S. Steel and Consolidated in the sale of pipe. The court gave as a reason for this conclusion that the former's pipe "is essentially a heavy walled pipe for high pressure purposes only and is chiefly used in the oil and gas industry," whereas Consolidated's pipe "is a comparatively light walled pipe for low pressure purposes solely, such as irrigation, water transmission and water well casings" (R. 59). The latter statement is directly contrary to the testimony of appellees' witnesses and must be attributed to an incomplete examination of the evidence.

Appellees' witness McConnor, vice president of National Tube in charge of sales (R. 277), testified that Consolidated makes pipe for transmission or trunk lines (R. 281); that it and National Tube have recently sold pipe to the same customer for the same pipe line on at least two occasions (R. 282-283); that "predominantly" the pipe made by Consolidated is lighter weight for lower pressure than National Tube's pipe (R. 287); that the pipe made by Consolidated for gas lines is capable of performing "the same sort of service" as National Tube's pipe (R. 287);[42] and that the "only" difference between the pipe sold by Consolidated for the Trans-Arabian pipe line and that sold by National Tube for the Big Inch pipe line was in diameter of pipe and "some minor differences in specification" (R.

[41] The court's finding as to absence of competition is not even inferentially supported by its accompanying finding that the two companies used different processes in making pipe, i. e., that Consolidated fabricated steel pipe from steel plates and National Tube manufactures buttweld and seamless pipe.

[42] The witness also testified that the characteristics of pipe required for either an oil line or a gas pipe line are "very, very similar" (R. 289).

293).[43] Another witness for appellees, the president of Consolidated, testified that it had recently gone into the business of making "heavy" welded pipe for oil and gas pipe lines and that it was presently furnishing pipe to three such lines (R. 360).

The district court's opinion also states that the testimony "shows a substantial price range in favor of the U. S. Steel process" for making pipe for oil and gas pipe lines (R. 59). There was testimony that in instances in which Consolidated and National Tube had both sold 24" or 26" pipe for the same pipe lines, Consolidated's price was substantially higher than National Tube's (*supra*, p. 26). There was also some very indefinite testimony to the effect that National Tube had an advantage in manufacturing costs as to pipe of these sizes (R. 281). But in the face of Consolidated's demonstrated ability to capture huge pipe-line orders, any assumption that it will be unable to compete on a price basis for 24" or 26" pipe when there no longer is a seller's market is highly speculative. Furthermore, not only did the vice president of National Tube testify that his company met "very stiff competition" from three companies (A. O. Smith, Republic Steel Company, and Youngstown Sheet and Tube Company) which, like Consolidated, made an electric welded pipe (R. 288),[44] but seamless pipe, which National Tube makes, has been losing ground to welded pipe.[45]

[43] While the testimony on the point is not entirely clear, it appears that the pipe for the Trans-Arabian line and that for the Big Inch line were both of the same thickness, 3/8 of an inch (R. 293).

[44] The pipe which they made does not come under National Tube's process patent (now expired) on the making of electric welded pipe (R. 288).

[45] The annual report of the Iron and Steel Institute for 1941 shows (pp. 39-40) that of 796,324 tons of pipe line produced in 1940, 547,070 or 68.7% were produced by the seamless process and 118,047 tons or 14.8% by the weld process. The Institute's report for 1945, the last year

But even if it should be assumed that Consolidated's manufacturing costs for 24″ or 26″ trunkline pipe will, in the future, be higher than National Tube's, the two companies will clearly continue to be in substantial competition with each other in the sale of pipe, provided one does not absorb the other. A prospective purchaser will then have a clear competitive choice between Consolidated's pipe, with its higher cost but compensating larger size, and National Tube's smaller-diameter, lower-cost pipe. Many factors, such as estimates of the future maximum capacity required, pumping costs, storage capacity, operating costs, will enter into his choice of product.[46] Products performing the same functions but differing somewhat in their characteristics may be fully as competitive as products which are identical.[47]

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available, shows (p. 49) that of the 844,515 tons of line pipe produced that year 337,741 tons or 39.9% were produced by the seamless process and 289,449 tons or 34.3% by the weld process.

[46] The above considerations are strikingly illustrated by the amended application filed by Southern California Gas Company and Southern Counties Gas Company for Federal Power Commission authorization to construct a pipe line (Docket No. G-675). The amended application states:

> Applicants have completed studies which show that a saving in annual costs of the proposed pipe line will be effected by the use of 30″ O. D. pipe rather than 26″ O. D. pipe as originally proposed. The use of the larger diameter pipe will enable the Applicants to reduce the pipe-line pressures required to obtain a capacity of 305 million cubic feet daily from 907 psig, as required for 26-inch pipe, to 815 psig, thereby effecting a reduction in the horsepower to be required at the Blythe compressor station from 12,400 to 10,000. This reduction in horsepower will result in annual fuel savings of approximately 230 million cubic feet of gas, accompanied by a corresponding reduction in operating expenses. A further consideration which led Applicants to adopt a design involving the use of 30-inch diameter pipe is that should the need and justification arise in the future for increasing the pipe-line capacity from 305 million to 400 million cubic feet per day or more, the 30-inch diameter would enable Applicants to make a very substantial saving in the incremental annual costs required to give such added capacity, as compared to the corresponding costs for the 26-inch design.

[47] "Competition among sellers, even though imperfect, may be regarded as effective or workable if it offers buyers real alternatives sufficient to

Not only is there existing competition between U. S. Steel and Consolidated in that both of them make pipe for oil and gas lines and both offer to buyers a competitive choice of products, but Consolidated has demonstrated its ability and willingness to expand, in response to consumer demand, the types of pipe products which it manufactures (R. 293).

In judging the restraints resulting from acquisition of Consolidated by U. S. Steel, an important consideration is the very small number of other companies equipped to make and sell pipe for oil and gas trunklines. The vice president of National Tube testified that he believed that Consolidated was the only company which had submitted a "firm proposition" for pipe for the Trans-Arabian pipe line (R. 292). When he was asked whether any other company had the capacity and organization to handle this business, he answered that other companies probably had the organization, "but they would not have the capacity under these conditions probably and they may not have everything else that goes along with it" (R. 293).[48] He further testified that his company and the A. O. Smith Company of Milwaukee were the only bidders on pipe for the Big Inch pipe line and that these two companies were the only ones which at that time could make pipe of the kind specified by the purchaser (R. 293).

enable them, by shifting their purchases from one seller to another, substantially to influence quality, service, and price. Competition, to be effective, need not involve the standardization of commodities; it does, however, require the ready substitution of one product for another; it may manifest itself in differences in quality and service as well as in price." Wilcox, *Competition and Monopoly in American Industry*, Monograph No. 21, Temporary National Economic Committee, p. 8. See also *infra*, pp. 47-48.

[48] He also stated that he did not believe that Consolidated was in a position to handle this business until they added equipment "made specially for the job" (R. 293).

Another consideration pertinent to the degree and extent of Consolidated's future competition is that such protection against its past competition as was given National Tube by its patent on the electric welding process used by Consolidated came to an end in November 1947 (*supra*, p. 27).

C. *The Acquisition would Preclude and Restrain Substantial Potential Competition in the Sale of Other Steel Products*

Actions brought by the United States under Section 4 of the Sherman Act "to prevent and restrain violations" of the Act have as their objective preventing the defendants from *thereafter* restraining or monopolizing trade and commerce. In measuring the restraint or monopoly brought about by combining two independent enterprises into one, their past competition provides a means for determining the character and extent of the competition which their combination will blot out. But to the extent that the evidence shows them to be potentially competitive beyond the limits of the existing competition, their combination constitutes a still greater threat to and restraint upon trade, requiring invocation of the injunctive remedies of the Act.

These principles have received clear recognition in decisions of this Court dealing with mergers of competitors. In *Standard Oil Co.* v. *United States*, 221 U. S. 1, 74-75, this Court referred with approval to the statement by the district court in that case, that the defendants' acts operated to destroy the "potentiality of competition" to such an extent as to cause their conduct to be in violation of Sections 1 and 2 of the Sherman Act. In *United States* v. *Southern Pacific Co.*, 259 U. S. 214, 230, defendants' counsel sought to distinguish *United States* v. *Union Pacific R. R. Co.*, 226 U. S. 61, upon the ground that "the decision there rested only on the fact that a then existing competi-

tion was restrained," but this Court declared that the principle of that decision and of other prior cases "was broader than the mere effect upon existing competition between the two systems."[49] The reason for the broader principle is stated in the dissenting opinion in *United States* v. *Union Pacific R. Co.*, 188 Fed. 102, 124-125 (C. C. D. Utah), as follows:

> Competition, as the antithesis of monopoly, is the influence which those in the same line of business have on each other, and that influence may as well be manifested in an existing capacity and preparedness as in the degree of active exercise.

The war record of Consolidated, demonstrating its ability to make a new product on a vast scale, throws into high light its potentialities as a competitor of U. S. Steel. During the war period Consolidated, which had not previously engaged in shipbuilding (R. 341), made steel ships for the Government and received for this work over $1,500,000,000, which was more than ten times the value of all its commercial work during the period 1937-1946 (Def. Ex. 60, R. 615).[50]

On the present record, there can be no question of Consolidated's ability to engage in volume production. The wide range of products which it makes is equally persuasive of its competitive potentialities. We set forth below a list prepared by Consolidated of "some of the principal types of products" which it makes (R. 409-410).[51] What U. S. Steel

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[49] Even in criminal cases under the Sherman Act an indictment will lie for the suppression of competition not yet in existence. *United States* v. *Patterson*, 59 Fed. 280, 283 (C. C. D. Mass.).

[50] A subsidiary of U. S. Steel, Federal Shipbuilding and Dry Dock Co., is engaged in shipbuilding and the dollar volume of its sales of ships for the years 1940-1946 was over $1,125,000,000 (R. 95).

[51] Accessories, railroad.
Agitators.
Air preheaters (plate and tubular).
A.P.I. oil storage tanks, all sizes.
Barges of all kinds.
Bins, steel, all kinds.
Boilers, various kinds.
Bolted tanks.

has designated as a "Partial List" of its products appears in its annual report for 1946 (Pl. Ex. 36, R. 576-578). The two lists make it evident that each company can readily undertake fabrication of almost any type of steel product, as profit considerations may dictate. This is illustrated by the fact that Consolidated has in the past made, but is not presently making, a number of different products, including oil refinery equipment (R. 363-364), hemispherical bottom tanks and towers (R. 362-363), and boilers, which it discontinued making in 1934, made again during the war, and could now make if it had the orders (R. 361, 365-366).

Bridges, structural steel.
Buildings, structural steel.
Caissons.
Cableways.
Cars, tank.
Cement Mfg. machinery.
Coal pulverizing equipment.
Cracking stills.
Culvert pipe.
Derricks, steel.
Dragline buckets.
Economizers, fuel.
Erection equipment, all kinds.
Expansion joints.
Flanging and dishing, all kinds.
Floating pontoon decks.
Flumes, steel.
Gas holders.
Gates (slide, drum, taintor, bulkhead).
Hemispherical bottom tanks and towers.
Hulls, dredge.
Joists, trussed steel and rolled.
Kilns, rotary.
Machine shop job work.
Machinery (heavy):
  Sugar mill.
  Operating mechanisms, all kinds.
Mining.
Mill buildings.
Oil refinery equipment.
Penstocks.
Pipe, welded and riveted.
Pipelines and appurtenances,
Plate work, all kinds.
Portable buildings.
Pressure vessels.
Process buildings and equipment.
Smoke stacks, steel.
Sprinkler tanks.
Standpipes.
Steel forms for concrete.
Storage tanks, welded and riveted.
Towers (absorption, fractionating, radio, transmission).
Truck tanks.
Tunnel liners, steel.
Valves (butterfly, gate, needle, sphere).
Welding.
Well casing.

D. *Under the Principles Applied by this Court in Construing the Sherman Act and under the Decided Cases, Destruction of Substantial Competition between Two Independent Concerns by Bringing Them under Single Ownership Constitutes a Combination in Illegal Restraint of Interstate Commerce*

Section 1 of the Sherman Act makes unlawful, not only contracts and conspiracies in restraint of trade, but also "combination in the form of trust or otherwise" in restraint of trade. In condemning a trade-restraining "trust", Congress dealt in specific terms with what was at the time the most commonly used device for restraining trade. But, by use of the all-inclusive phrase "or otherwise," Congress made it clear that all combinations, whatever their form, having the condemned effect on trade were unlawful. That acquisition of the assets of one competitor by another is a combination within the meaning of Section 1 is not open to question. In *Standard Oil Co. v. United States,* 221 U. S. 1, 50, this Court recognized that Congress was aiming at all forms of combination, and particularly at those achieved through corporate organization.

By Section 2 of the Act Congress also condemned monopolization. While every monopolization is a species of restraint forbidden by Section 1 and while the two sections overlap in this sense, a combination in restraint of trade, violative of Section 1, is not necessarily a monopolization falling within the condemnation of Section 2. *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, note 59, at p. 226; *American Tobacco Co.* v. *United States,* 328 U. S. 781, 788. For this reason, combinations which take the form of a merger or union of competitors may effect a restraint of trade forbidden by Section 1 although the combining parties may not have such power and purpose to fix prices or to exclude competitors as would make them an unlawful monopolization under Section 2 of the Act.

As to the general conditions and evils which led Congress to pass the Sherman Act, this Court has said: "It was enacted in the era of 'trusts' and of 'combinations' of businesses and of capital organized and directed to control of the market by suppression of competition in the marketing of goods and services, the monopolistic tendency of which had become a matter of public concern." *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 492-493. Since there ~~can be~~ a no more complete suppression of competition between two companies than the acquisition of one by the other (*United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 186),[52] suppression of competition by this form of combination falls directly within the evils which the Act was designed to prevent.

The fact that a prohibited restraint is effected through the medium of bringing two or more concerns under single ownership does not insulate the restraint from the prohibitions of the Act. *United States* v. *Yellow Cab Co.*, 332 U. S. 218, 227. The statute is aimed at substance rather than form. *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344, 360-361, 376-377. It is intended to embrace "every conceivable act which could possibly come within the spirit or purpose of the prohibitions of the law, without regard to the garb in which such acts were clothed." *United States* v. *American Tobacco Co.*, 221 U. S. 106, 181. And it is the character of the restraint, not the amount of commerce affected, which is controlling in determining whether a violation of Section 1 has occurred. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, note 59, at p. 225; *United States* v. *Yellow Cab Co., supra*, p. 225. "Monopoly power," this Court has said, "is not the only power which

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[52] "This form of combination yields, as far as it reaches, the most decisive, the most complete, the most certain power over supply and over prices which could be obtained." National Industrial Conference Board, *Mergers and the Law* (1929) 152.

the Act strikes down." *United States* v. *Socony-Vacuum Oil Co., supra*, p. 224.

If Consolidated had agreed with U. S. Steel that it would sell its structural steel products or pipe for trunklines at not less than the prices fixed by U. S. Steel for its own products, this would plainly be a combination in restraint of trade prohibited by Section 1 of the Act. Since the sales as to which U. S. Steel and Consolidated are directly competitive are, by any standard, an appreciable segment of interstate sales (see *supra*, pp. 10-11, 19-20, 25-26), the illegality of such a price-fixing combination would be beyond question. *United States* v. *Yellow Cab Co., supra*, p. 226. And this combination would not be saved from illegality by a showing that the parties "were in no position to control the market," or that the agreed sales prices were "reasonable," or that an objective of their combination was prevention of real or fancied competitive abuses. *United States* v. *Socony-Vacuum Oil Co., supra*, pp. 221-222. Price-fixing agreements, moreover, are not the only kinds of combinations in restraint of trade which do not permit of justification. *International Salt Co.* v. *United States*, 332 U. S. 392, 396; *Fashion Originators' Guild, Inc.* v. *Federal Trade Commission*, 312 U. S. 457, 468.

A price-fixing combination suppresses, as between the parties, one form of competition (*United States* v. *Trenton Potteries Co.*, 273 U. S. 392, 397). A combination for the acquisition of one company by another suppresses, on the other hand, *all* competition between the parties. It also suppresses competition, not merely for the life of a terminable, consensual agreement, but, practically speaking, for all future time (unless a court intervenes to stop or undo the combination).[53] On principle, therefore, a merger which

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[53] This Court has pertinently observed that "where businesses have been merged or purchased and closed out it is commonly impossible to turn

suppresses all competition between two independent enterprises competing with each other in sales representing an appreciable segment of interstate trade, constitutes a combination in restraint of trade forbidden by Section 1 of the Act and cannot be saved from condemnation by resort to any "rule of reason."

The decisions of this Court generally conform to the view above stated. The first case under the Act to come before the Court, *United States* v. *E. C. Knight Co.*, 156 U. S. 1, is not of present significance since decision turned upon the theory, now long rejected, that the bringing of independent manufacturing concerns under one control subjected to restraint only manufacture, an intrastate activity, not interstate sales of the products of manufacture. The next "merger" case in this Court, *Northern Securities Co.* v. *United States*, 193 U. S. 197, involved a holding company formed for the purpose of acquiring the controlling stock interest in two competing railroads running through the northern tier of states from the Great Lakes to the Pacific Northwest. The Court, in holding that this combination violated the Act and should be dissolved, stated (pp. 331-332) that the governing principles were, among others:

> That *every* combination or conspiracy which would extinguish competition between otherwise competing railroads engaged in *interstate trade or commerce*, and which would *in that way* restrain *such* trade or commerce, is made illegal by the act;
>
> * * * * * * *
>
> That to vitiate a combination, such as the act of Congress condemns, * * * it is only essential to show that by its necessary operation it tends to restrain interstate or international trade or commerce or tends

back the clock." *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 186.

to create a monopoly in such trade or commerce and to deprive the public of the advantages that flow from free competition;

The above principles received concrete application in *United States* v. *Union Pacific R. R. Co.*, 226 U. S. 61. In that case this Court unanimously held that where two railroads are in competition for traffic which is substantial in amount, acquisition by one of control of the other is in illegal restraint of trade. The lines of the two railroads involved were widely separated. The line of the Union Pacific ran from Kansas City via Ogden, Utah, to Portland, and that of the Southern Pacific ran from New Orleans via El Paso to Los Angeles and then up the Coast to San Francisco and Portland. The two roads were, however, competitive for traffic between eastern points and San Francisco since the Central Pacific (which the Southern Pacific controlled) provided a rail connection between Ogden and San Francisco. Rates were not increased during the period of stock control nor did this Court refer to any other trade-restraining conduct apart from that which was the necessary result of bringing the two roads under one control. This Court held (p. 88) that the Union Pacific's acquisition of stock control of the Southern Pacific "restrains interstate commerce within the meaning of the statute, because, in destroying or greatly abridging the free operation of competition theretofore existing, it tends to higher rates."[54] This Court flatly repudiated the view, adopted by the district court in the present case, that because that part of the business of the two companies as to which they were competitive was only a minor fraction

[54] Where one industrial concern acquires another, the acquisition, by destroying their prior competition, tends in like manner to higher prices for the products which they make.

of their total business, there was no illegal restraint of trade. This Court said (pp. 88-89):

> It is urged that this competitive traffic was infinitesimal when compared with the gross amount of the business transacted by both roads, and so small as only to amount to that incidental restraint of trade which ought not to be held to be within the law; but we think the testimony amply shows that while these roads did a great deal of business for which they did not compete and that the competitive business was a comparatively small part of the sum total of all traffic, state and interstate, carried over them, nevertheless such competing traffic was large in volume, amounting to many millions of dollars. Before the transfer of the stock this traffic was the subject of active competition between these systems, but by reason of the power arising from such transfer it has since been placed under a common control. It was by no means a negligible part, but a large and valuable part, of interstate commerce which was thus directly affected.

United States v. *Southern Pacific Co.*, 259 U. S. 214, held that control of the Central Pacific by the Southern Pacific was in illegal restraint of trade since the Southern Pacific had used such control preferentially to solicit movement of transcontinental traffic over its own line rather than the shorter line formed by the Central Pacific, the Union Pacific, and the latter's eastern connections. This Court said (p. 229) the Southern Pacific's acquisition of the stock of the Central Pacific "constituted a combination in restraint of trade because it fetters the free and normal flow of competition in interstate traffic and tends to monopolization." The Court also said (p. 233): "We cannot accept the theory of prior practical consolidation [of the two railroads] as a justification for a violation of the Sherman Act resulting

from the stock control acquired in 1899."[55] The *Northern Securities* and the *Union Pacific* cases, the Court said (pp. 230-231), stand for a broader principle than that an acquisition is illegal if it destroys "existing competition"; they establish that an acquisition of a competing concern violates the Sherman Act when its effect "is to suppress or materially reduce the free and normal flow of competition in the channels of interstate trade." The case evidently holds therefore that acquisition of a merely potentially competitive company may be in illegal restraint of commerce in that the acquisition destroys all possibility of future competition between the acquiring and the acquired company.

In *United States* v. *Reading Co.*, 253 U. S. 26, the defendants had, through the medium of a holding company, acquired control over two anthracite coal carriers and two companies which together produced about one-third of the total output of anthracite coal. The district court had found that the two controlled railroads "do not reach the same collieries and do not compete for the same shipments" and had refused to require separation of one from the other (*United States* v. *Reading Co.*, 226 Fed. 229, 271-272 (E.D. Pa.)), but this Court pointed out that the defendants regarded all roads carrying anthracite coal to New York as competitors from the standpoint of fixing rates (253 U. S. 26, 51-52). It held that the defendants had "by deliberate, calculated purchase for control" obtained dominion over two competing interstate railroads and two competing coal companies and that "such a power, so obtained, regardless of the use made of it, constitutes a menace to and an undue restraint upon interstate commerce within the meaning of the Anti-Trust Act" (*idem.*, p. 57).

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[55] The facts indicate (see pp. 232-233) that the same group of individuals had been in practical control of the two railroads since 1885.

The principles stated and enforced in the cases which we have discussed obviously have full application to a merger or other consolidation of industrial concerns. While there is a passing dictum in *Thomsen* v. *Cayser*, 243 U. S. 66, 85, that common carriers are under a duty to compete and therefore are subjected "in a special sense" to the policy of the antitrust laws, the obligation of common carriers to render service to all on a non-discriminatory basis is not a special duty to compete. Plainly the prohibitions of the Sherman Act apply with at least as much force to industrial combinations as to combinations of railroads. Indeed, the Interstate Commerce Act applicable to railroads during the life of the Sherman Act is designed to assure reasonable rates and non-discriminatory service and obviates some of the dangers incident to elimination of competition by acquisition or merger.

All of the decisions which we have cited except the *Northern Securities* case were decided after this Court had enunciated the so-called "rule of reason" in *Standard Oil Co.* v. *United States*, 221 U. S. 1. This rule merely requires that in determining what kinds of restraints and monopolizations the Sherman Act prohibits, consideration must be given to the evils against which the statute was directed and to the common law doctrines from which some of its terms are derived. *Standard Oil Co.* v. *United States*, *supra*, pp. 50-51, 59-62; *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 492-495. Where competition is directly suppressed by acquisition of a competing concern, the restraint is of a kind which this Court has repeatedly held to be forbidden by the Act and there is therefore no occasion to resort to the interpretive rule announced in the *Standard Oil* case.

It should be borne in mind in this connection that the *Standard Oil* case did not involve, as does the present one,

restraint of trade effected by a merger or acquisition of previously independent concerns. This aspect of the Standard Oil combination antedated the Sherman Act, and when the defendants in 1899 brought about an exchange of the stock of 19 controlled companies (several of which controlled numerous other companies) for stock of another controlled company, Standard Oil Company of New Jersey, there was no suppression of existing competition but merely a change in the form of control serving to solidify it.[56] This Court held that, in all the circumstances, the combination constituted a continuing violation of both Section 1 and Section 2 of the Act by reason of (1) the dominating power and control over the industry which the combination had attained and (2) the intent, manifested by the acts of the defendants, to secure and maintain this mastery by excluding others from the field (221 U. S. 1, 74-76).

The decision in *United States* v. *American Tobacco Co.*, 221 U. S. 106, where the evidence showed flagrant violation of Sections 1 and 2 of the Sherman Act, is somewhat

[56] The facts as set forth in the opinion of this Court (221 U. S. 1, 31-42) and that of the district court (173 Fed. 177, 180-182) show the following: The Standard Oil Company of Ohio was formed in 1870 and the individuals in control of that company and certain associates of theirs rapidly brought numerous competitors under their control. In 1882 they executed a trust instrument and transferred to the trustees the stock of the various controlled corporations in exchange for trust certificates. After the Supreme Court of Ohio had held in 1892 that this trust was illegal under the antitrust laws of that State, the trustees, who then held stock in 84 companies, transferred the stock of 64 companies to the other 20 companies, but the Standard Oil trustees and their associates remained in control of these companies. In 1897 the Attorney General of Ohio instituted contempt proceedings alleging that the decree entered by the Ohio Supreme Court in 1892 requiring dissolution of the trust had not been complied with. Thereupon the defendants in 1899 had one of the controlled companies, Standard Oil Company of New Jersey, increase its capital stock by $100,000,000, which new stock it then exchanged for stock of the remaining 19 principal controlled companies, so that the entire group of controlled companies became subsidiaries of Standard Oil of New Jersey.

remote from the issues presented here and need not be stated.

Consideration must be given to certain decisions upon which the appellees may rely. In *United States* v. *United Shoe Machinery Co.*, 247 U. S. 32, the charge against the defendants was that they had combined competing companies and had subsequently acquired others in violation of Section 1 of the Sherman Act and that they were monopolizing commerce in violation of Section 2. The Government's contention, this Court said (pp. 38-39), was that the offense of combination was committed in 1899, twelve years before the suit was brought, when seven companies engaged in making, vending, and leasing shoe machinery under the companies' several patents were consolidated. This Court accepted (pp. 41, 44, 47) the trial court's findings that the machinery and patents of the consolidated companies were complementary, not competitive, and that "the companies were not in competition at the time of their union." The decision therefore has no application to a case like the present one where competing concerns suppress their competition by merger, acquisition or consolidation.[57] And it should be observed that this Court, after noting that the defendant corporation and the public had made large investments between the time of consolidation and the bringing of suit attacking it, said (pp. 45-46), "The lapse of time, indeed, may not condone the offense if offense there was."

United States v. *United States Steel Corp.*, 251 U. S. 417, was a suit brought in 1911 seeking dissolution of the Steel Corporation (one of the present appellees), which had been organized in 1901 to acquire and hold the stock

[57] A criminal indictment under the Sherman Act based upon the same consolidation was held not to set forth an offense under the Act because, as the indictment was interpreted, the companies which were consolidated "did not compete with one another." *United States* v. *Winslow*, 227 U. S. 202, 217.

of twelve operating companies previously independent.[58] This Court concluded (p. 451) that since the defendant corporation had not at any time engaged in predatory or coercive practices and had abandoned, prior to the Government's suit, certain illegal price-fixing activities, "no act in violation of law [after 1911] can be established against it except its existence be such an act." (See also pp. 440, 445.) In answer to the Government's contention (see p. 450) that the size of the corporation gave it power the necessary effect of which was unduly to restrain competition, this Court said (p. 451) that the law does not make "mere size" or "the existence of unexerted power" an offense. The Court appears to have held (pp. 452-453, 457) that although the corporation had been illegally formed and continued in "possession of power unlawfully obtained," nevertheless, in determining whether relief by way of dissolution should be granted, "the public interest is of paramount regard."[59]

The case is a precedent respecting the granting of relief by way of dissolution where this question is to be determined some twenty years after competing concerns have been united (and subsequently operated as a single business enterprise). It is not a precedent as to what constitutes such an illegal combination or as to the relief which is appropriate when, as in the present case, the combination is attacked at its birth. We also point out that the *Steel*

[58] Between 1901 and 1911 the corporation's share of the business fell from over 50% to about 41% (251 U. S. 417, 439).

[59] On the question of such public interest, the Court said (p. 453) that "the many millions of dollars spent, the development made, and the enterprises undertaken, the investments by the public that have been invited [between 1901 and 1911] are not to be ignored." The Court also said (p. 457): "In conclusion we are unable to see that the public interest will be served" by decreeing dissolution; "and we do see in a contrary conclusion a risk of injury to the public interest, including a material disturbance of * * * foreign trade."

case, like the *United Shoe Machinery* case, was decided by less than a majority of the full membership of the Court.[60]

In *United States* v. *International Harvester Co.,* 274 U. S. 693, ~~even more~~ clearly than in the *Steel* case, the Court did not rule upon the question whether trade is illegally restrained when competing companies are combined. While the defendant corporation had been formed in 1902 to acquire the assets of five leading manufacturers of harvesting machinery, this Court (pp. 702-703) construed the Government's acceptance of the consent decree which had been entered in the cause in 1918 as an abandonment of any charge of illegality based upon acts antedating this decree. The case came before this Court on appeal from the judgment entered on the Government's application for further relief, as provided for in the consent decree, in the event that on the expiration of 18 months after termination of the existing war, competitive conditions in the sale of harvesting machines had not been established "in harmony with law." See p. 697. This question the Court examined and decided without reference to the absorption of competitors incident to the corporation's formation in 1902.

International Shoe Co. v. *Federal Trade Commission,* 280 U. S. 291, upon which the district court in the instant case primarily relied (R. 55-56, 64), was a proceeding under Section 7 of the Clayton Act.[61] This Court, in setting aside the Commission's order of prohibition, gave as one ground of decision (pp. 299-303) that the acquired company was facing bankruptcy and that in these circumstances its acquisition "does not substantially lessen competition

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[60] In each case two Justices were disqualified and three Justices dissented.

[61] This Section makes it unlawful for one corporation to acquire stock of another corporation where the effect may be "to substantially lessen" competition between them, or "to restrain such commerce in any section or community, or tend to create a monopoly in any line of commerce."

or restrain commerce within the intent of the Clayton Act." Another ground of decision (pp. 298-299) was that the acquisition did not produce the result forbidden by the statute. The Court said that "materially less" than 5% of each company's product was sold in competitive markets and "it is hard to see in this, competition of such substance as to fall within the serious purposes of the Clayton Act." [62]

Our review of the leading cases dealing with acquisition or combination of competing companies confirms, we believe, our earlier statement (*supra*, pp. 52-53) that this Court has adhered, with some slight divagations, to the view that a merger or other union of previously independent companies is a combination in illegal restraint of trade where the competition thereby eliminated is substantial in amount. And certainly acquisition of Consolidated by U. S. Steel comes within such rule. By any recognized standard, the sales of structural steel products and of trunkline pipe for which they compete are substantial in volume.

No case has undertaken to state definitively how much competition must be eliminated in order that a union of independent enterprises fall within the condemnation of that statute. But it is clear that the resulting restraint is not saved from illegality by reason of the fact that the business of the combining units as to which they are competitive is a relatively small part of their total business. *United States* v. *Union Pacific R. R. Co.*, 226 U. S. 61, 88-89. Any other rule would lead to the anomalous result that the greater the amount and scope of business done by the acquiring company, and consequently the smaller the proportion of competitive business to the total, the greater would be its freedom to expand through absorption of competitors without violating the antitrust laws. This would

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[62] Mr. Justice Stone's persuasive dissent from the Court's conclusions was concurred in by Mr. Justice Holmes and Mr. Justice Brandeis.

be directly contrary to the primary objective of Congress in passing this legislation—to prevent and curb the evils deemed to result when large segments of interstate trade in any commodity are, through the medium of corporate combination, brought under unified control (*supra*, pp. 50-51).

Finally, we note U. S. Steel's contention that the acquisition of Consolidated is in the public interest in that it would enable U. S. Steel to compete on more even terms with Bethlehem Steel Corporation by reducing disadvantages faced by U. S. Steel in competing with Bethlehem in the sale of fabricated steel products in the Western states.[63] But under the Sherman Act restraint of trade effected by merger of competitors is not rendered permissible by a showing that this will enable the acquiring company to compete more effectively with its remaining competitors. This principle, if sound, would have no ending point until only two competitors remained in the field. For U. S. Steel's acquisition of Consolidated would, by similar token, furnish justification for Bethlehem's absorption of some other independent, which in turn might validate further acquisitions by U. S. Steel. We have found in the decisions of this Court no support for this kind of a trade-restraining chain reaction.

III

U. S. Steel's agreement to acquire Consolidated is an attempt to monopolize a part of interstate commerce, in violation of Section 2 of the Act

U. S. Steel is a thoroughly integrated enterprise engaged in the steel making business at all levels of production (*supra*, p. 7). Expansion at one level furnishes its own justification, the corporation believes, for expansion at some other level. Its purchase of the Government-

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[63] The district court in its findings of fact (Fng. 37, R. 46) gave this contention inferential support.

owned plant at Geneva it gives as a reason for acquiring Consolidated, the largest independent fabricator of steel products on the West Coast. It states that a major purpose of the acquisition is to provide an assured outlet for the rolled steel products of its Geneva plant and thereby promote profitable operation of that plant (*supra*, p. 9).

A program of expansion, such as that persistently pursued here, may constitute an attempt to monopolize, unlawful under Section 2 of the Sherman Act. The essence of the offense of attempted monopolization is aptly set forth in *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 431-432 (C.C.A. 2):

> Although the primary evil was monopoly, the Act also covered preliminary steps, which, if continued, would lead to it. These may do no harm of themselves; but, if they are initial moves in a plan or scheme which, carried out, will result in monopoly, they are dangerous and the law will nip them in the bud. For this reason conduct falling short of monopoly, is not illegal unless it is a part of a plan to monopolize, or to gain such other control of a market as is equally forbidden. To make it so, the plaintiff must prove what in the criminal law is known as a "specific intent"; an intent which goes beyond the mere intent to do the act.

The frankly avowed program of U. S. Steel to achieve full-line integration in its West Coast operations tends to show the "specific intent" required to establish an attempt to monopolize, particularly when this is considered against the background of the corporation's long history of acquisition and combination. In 1911, when the Government's original antitrust suit against U. S. Steel was instituted, it had already absorbed 180 formerly independent concerns (*United States* v. *United States Steel Corp.*, 223 Fed. 55, 162 (D. N. J.)). And following the decision of that case by this Court in 1920, there have been the following acquisi-

tions, among others, of previously independent concerns: 1924, Cyclone Fence Co.; 1930, Atlas Portland Cement Co., Washington Coal & Coke Co., Columbia Steel Corp. (R. 105-106) and Oil Well Supply Co. (R. 110); 1936, Virginia Bridge & Iron Co. (R. 111); 1939, Boyle Manufacturing Co. (R. 106); 1943, Petroleum Iron Works (R. 106-107).[64]

Even if it be assumed that the foregoing acquisitions, individually considered, were lawful, they bear upon the problem whether the instant acquisition is part of a monopolistic program.[65] Plainly the acquisition would buttress and substantially increase U. S. Steel's existing dominant position in the sale of fabricated steel products in the Consolidated market. We submit that, under all the circumstances, the acquisition would be not only a combination in restraint of trade forbidden by Section 1 of the Act but also an attempt to monopolize prohibited by Section 2.

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[64] For the acquisitions mentioned other than those for which record references are given, see Moody's 1947 Industrial Manual, p. 2776.

[65] This Court has held that, in determining whether defendants are violating Sections 1 and 2 of the Sherman Act, it may examine their acts (including acquisitions of competitors) over a long period of time, even antedating passage of the Act, for the light which this throws upon the purposes and effect of their present conduct. *Standard Oil Co.* v. *United States*, 221 U. S. 1, 46-47; *United States* v. *Lehigh Valley R. R. Co.*, 254 U. S. 255.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the district court should be reversed, with directions to enter a judgment granting appropriate relief to the United States.

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